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No. 88-1859

In the Supreme Court of the United States

OCTOBER TERM, 1989

JERRALD M. JOHNSON, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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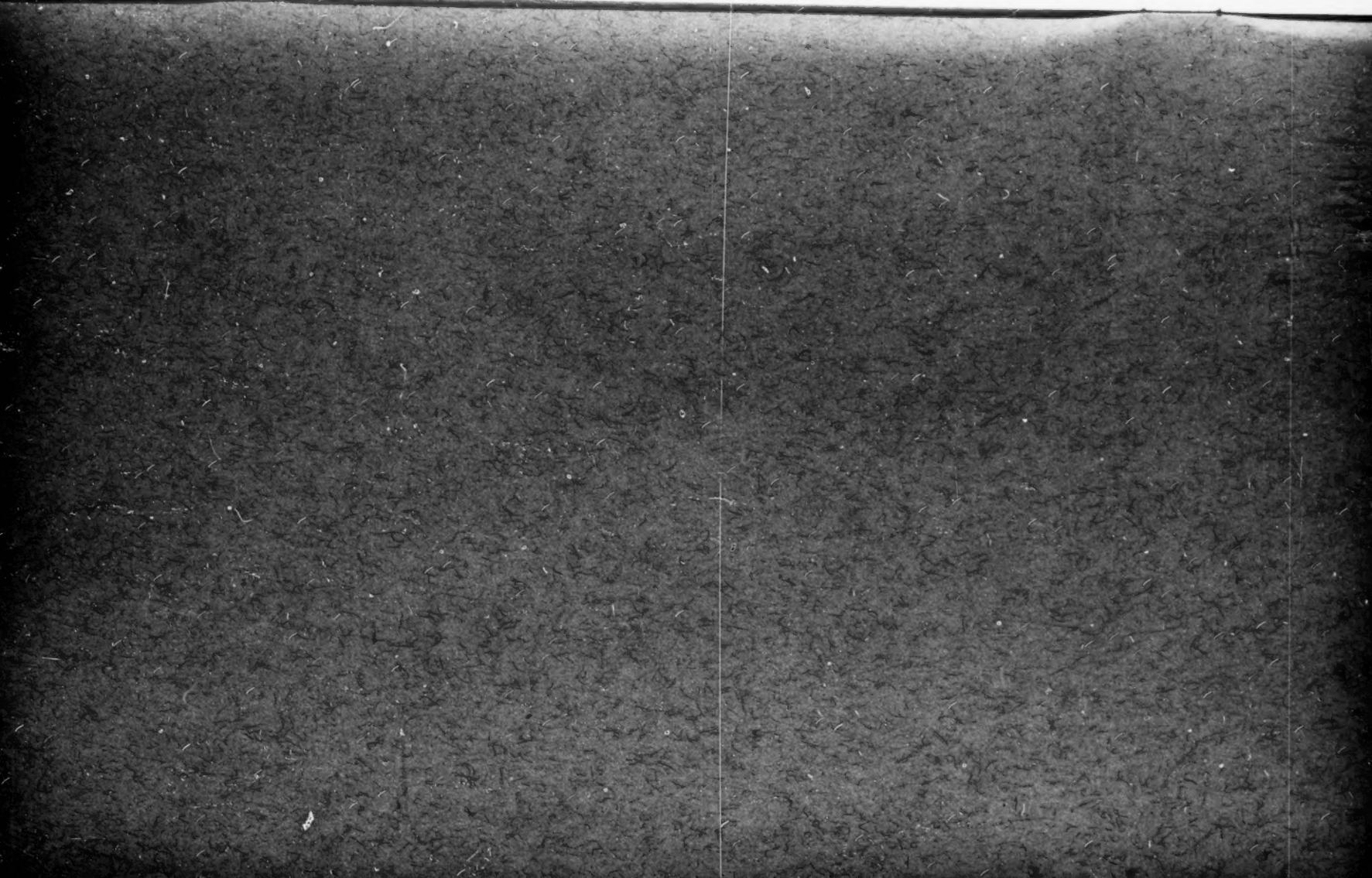

QUESTIONS PRESENTED

1. Whether the circumstances in this case obliged the district court to toll for equitable reasons the 30-day limitations period in which a federal employee can file an employment discrimination claim under 42 U.S. 2000e-16(c), because the employee had made and the court had acted upon a motion for appointment of counsel and for leave to proceed *in forma pauperis* before the limitations period expired.

2. Whether 42 U.S.C. 2000e-16(c) requires that an employment discrimination action brought by an employee of the United States Postal Service name the Postmaster General as defendant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 861 F.2d 1475. The opinion of the district court (Pet. App. 35-42) is reported at 113 F.R.D. 73.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1988. A petition for rehearing was denied on February 15, 1989. Pet. App. 1. The petition for a writ of certiorari was filed on May 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that the district court erred in dismissing his employment discrimination suit against the

United States Postal Service for failure to commence a timely civil action against the proper defendant.

1. On December 30, 1983, the Postal Service, citing petitioner's unauthorized absences from work, discharged him from his position as a mailhandler. Pet. App. 2. Petitioner appealed to the Merit Systems Protection Board, which affirmed his removal. The MSPB found that the agency had demonstrated that petitioner had been absent without authorized leave and that unauthorized absences disrupt the efficiency of the civil service. MSPB Initial Decision at 2-5; MSPB Order of August 3, 1984 (adopting initial decision as final order).

The Equal Employment Opportunity Commission rejected petitioner's subsequent request for review because it was untimely filed and accordingly advised petitioner that:

> you have the right to file a civil action in the appropriate United States District Court, based on the decision of the Merit Systems Protection Board, WITHIN THIRTY (30) DAYS of the date that you receive the Commission's decision.

EEOC Denial of Consideration at 2 (July 10, 1985) (emphasis in original). Petitioner received the EEOC decision on July 13, 1985. Pet. App. 2.

On July 18, 1985, petitioner filed in United States District Court a motion to proceed *in forma pauperis* and for appointment of counsel. Pet. App. 36. On July 22, 1985, the district court granted petitioner leave to proceed *in forma pauperis* and ordered the U.S. Marshal to serve process; the court, however, denied petitioner's request for court-appointed counsel. *Ibid.* On August 12, 1985—30 days after receiving notice of the EEOC decision—petitioner filed a pro se complaint alleging that the Postal Service had discriminated against him.[1] The complaint

[1] Petitioner's original complaint alleged that the Postal Service had discriminated against him and other similarly situated blacks who suf-

named the United States Postal Service and petitioner's union, the Mailhandlers, Local 321, as defendants,[2] but did not name the head of the Postal Service—the Postmaster General—as a party.

The U.S. Marshal served the Postal Service by certified mail; the Postal Service received process on August 16, 1985.[3] In response to the Postal Service's motion to dismiss, the district court concluded that the United States Postal Service was not the proper defendant according to the plain language of 42 U.S.C. 2000e-16(c). Pet. App. 37: The court further determined that petitioner could not amend his complaint pursuant to Fed. R. Civ. P. 15(c) so as to substitute the Postmaster General as the proper defendant and to have the substitution relate back to the original, timely-filed complaint. Following *Schiavone* v.

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fer from work related injuries. Complaint at 2-3. Petitioner subsequently amended his complaint to claim that the Postal Service had discriminated against him on the basis of a handicap, in violation of Sections 504 and 505 of the Rehabilitation Act of 1973, 29 U.S.C. 794 and 794a. Second Amended Complaint.

[2] On January 3, 1986, the district court dismissed the claim against the union for petitioner's failure to state a claim upon which relief could be granted; petitioner did not appeal that determination. Pet. App. 36.

[3] The U.S. Marshal did not serve the United States Attorney or the Attorney General, as it should have done under Fed. R. Civ. P. 4(d)(4) and (5). Pet. App. 3. On January 24, 1986, the district court issued an order to show cause why service of process had not been completed within the 120 days allotted by Fed. R. Civ. P. 4(j). Petitioner demonstrated sufficient cause and the court accordingly granted him an additional 30 days in which to perfect service. Pet. App. 36. Petitioner then served the U.S. Attorney on February 7, 1986, the U.S. Postal Service on February 10, 1986, and the Attorney General on February 11, 1986. Pet. App. 37. As the court of appeals held, the district court's grant of additional time to perfect service cured the U.S. Marshal's error. Pet. App. 12.

Fortune, 477 U.S. 21 (1986), the court held (1) that a proper party can be substituted as a defendant only if it received notice of the claim within the 30-day period for commencing a civil action, (2) that the only event that might conceivably constitute sufficient notice to the Postmaster General was service of the summons and complaint on the U.S. Postal Service, and (3) that the Postal Service did not receive notice until August 16, 1985, after the limitations period had expired. Pet. App. 39-41. The court therefore dismissed the case. Pet. App. 42.

The court of appeals, in a 2-1 decision, affirmed. Pet. App. 16. The court held that petitioner had not filed suit against the proper defendant within the applicable limitations period, and that petitioner could not make use of Rule 15(c)'s "relation back" procedure because the proper defendant had not received sufficient notice within the limitations period. Pet. App. 7-13. Finally, the court ruled that the facts of the case did not warrant equitable tolling of the limitations period because petitioner had not been actively misled or lulled into inaction. Pet. App. 13-15.

The dissenting judge was of the view that equitable tolling of the limitations period was appropriate, thereby permitting timely notice to the proper defendant. Specifically, the dissent reasoned that the statute providing that the U.S. Marshal would "serve all process and perform all duties" for those proceeding *in forma pauperis* (28 U.S.C. 1915(c)) in effect demanded "that the Marshal be cognizant of and act within the limitations period provided by statute in order to effect timely service." Pet. App. 28-29. Thus, the dissent concluded that petitioner had been lulled into believing that his complaint would be properly served in a timely manner. Pet. App. 20-29.

ARGUMENT

It is well-established that only the head of an employing federal agency, not the agency itself, is subject to suit under 42 U.S.C. 2000e-16(c).[4] Petitioner in this case failed properly to file suit against the head of the Postal Service, the Postmaster General, within the 30-day limitations period provided by Section 2000e-16(c). Nor could petitioner amend his complaint to take advantage of the "relation back" provision in Fed. R. Civ. P. 15(c), because no party—not the Postal Service, the United States Attorney, or the Attorney General—had notice, as is required by Rule 15(c), of the action within the time allowed for filing the suit. *Schiavone, supra;* see Pet. App. 7-13.

1. Petitioner therefore challenges the district court's determination that the circumstances of this case did not warrant an equitable tolling of the limitations period during the pendency of his motion to proceed *in forma pauperis* or until such time as the U.S. Marshal effected service. This fact-bound contention does not merit review.

Even if the 30-day filing period on employment discrimination claims is subject to equitable tolling,[5] the

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[4] See, *e.g.*, *Warren* v. *Department of the Army*, 867 F.2d 1156 (8th Cir. 1989); *Johnson* v. *United States Postal Service*, 861 F.2d 1475 (10th Cir. 1988); *Honeycutt* v. *Long*, 861 F.2d 1346 (5th Cir. 1988); *Bates* v. *T.V.A.*, 851 F.2d 1366 (11th Cir. 1988), cert. denied, No. 88-1548 (June 12, 1989); *Williams* v. *Army & Air Force Exch. Service*, 830 F.2d 27 (3d Cir. 1987); *Bell* v. *Veterans Admin. Hosp.*, 826 F.2d 357 (5th Cir. 1987); *Gonzales* v. *Secretary of the Air Force*, 824 F.2d 392 (5th Cir. 1987), cert. denied, 108 S. Ct. 1245 (1988); *Koucky* v. *Department of the Navy*, 820 F.2d 300 (9th Cir. 1987); *Hymen* v. *Merit Sys. Protection Bd.*, 799 F.2d 1421 (9th Cir. 1986), cert. denied, 481 U.S. 1019 (1987).

[5] The courts of appeals are divided on the question whether Title VII's 30-day filing period is a statute of limitations that is subject to equitable tolling or is instead a jurisdictional requirement that cannot

circumstances of this case did not require the district court to enlarge the time prescribed by Congress for commencing a civil action. The district court's grant of petitioner's request to proceed *in forma pauperis* in no way relieved petitioner of the obligation to name the proper defendant or otherwise signalled to petitioner that he had, despite suing the wrong party, done everything required of him. And while petitioner may have been entitled to assume that the U.S. Marshal would complete service within the 120 days allotted by Rule 4(j), this Court's decision in *Schiavone, supra,* makes clear that, notwithstanding the additional time allotted for service under the Federal Rules, a plaintiff who seeks to substitute a new party defendant under Rule 15 must still ensure that the new defendant receives notice within the applicable limitations period. Here, by filing his action on the last possible day, petitioner in fact ensured that all parties would receive service after the applicable limitations period.[6]

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be waived or enlarged on the basis of equitable considerations. Compare *Warren* v. *Department of Army*, 867 F.2d at 1159 (30-day limitations period not jurisdictional); *Hornsby* v. *U.S. Postal Service*, 787 F.2d 87, 89 (3d Cir. 1986) (same); *Martinez* v. *Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984) (same) with *Lamb* v. *U.S. Postal Service*, 852 F.2d 845, 847 (5th Cir. 1988) (30-day period is jurisdictional); *Koucky* v. *Department of Navy*, 820 F.2d 300, 302 (9th Cir. 1987) (same). The issue is not, however, presented here, since a decision by the district court that the limitations period presented a jurisdictional prerequisite would not have altered its decision to dismiss the action.

[6] As the court of appeals noted, the district court allowed service to be perfected on the U.S. Attorney and the Attorney General in February. Pet. App. 12. Even if those officials had been served at the time the Postal Service was served, petitioner's complaint was not timely for the purposes of Rule 15(c). As the court of appeals concluded, "[petitioner's] problems arise not from inadequate service, but from an inadequate complaint." Pet. App. 12.

Nothing in *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147 (1984), requires a different result. In *Baldwin County*, the Court noted that equitable tolling of a limitations period might be appropriate where a motion for appointment of counsel is pending and where considerations of equity justify suspending the limitations period. *Id.* at 151. Neither consideration supported tolling the limitations period here. The district court ruled on petitioner's motion to proceed *in forma pauperis* and for the appointment of counsel within four days and well before the limitations period expired. Pet. App. 36. There was thus no delay in ruling on petitioner's motion that prejudiced his rights or that warranted a departure from this Court's conclusion that "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of vague sympathy for particular litigants." *Baldwin County Welcome Center*, 466 U.S. at 152.

Indeed, the prompt resolution of petitioner's motion distinguishes this case from the other appellate precedent on which petitioner relies. Petitioner asserts that the decision below conflicts with *Warren* v. *Department of Army*, 867 F.2d 1156 (8th Cir. 1989); *Paulk* v. *Department of Air Force*, 830 F.2d 79 (7th Cir. 1987); and *Mondy* v. *Secretary of Army*, 845 F.2d 1051 (D.C. Cir. 1988), which, on the particular facts of each case, permitted equitable tolling of the limitations period during the pendency of a petition for leave to proceed *in forma pauperis*. Pet. 9-12. In each of those cases, however, the district court did not act on the motion within the applicable limitations period. *Warren*, 867 F.2d at 1160; *Paulk*, 830 F.2d at 80, 83; *Mondy*, 845 F.2d at 1052-1053 & n.2. Thus, in *Mondy*, a claimant filed his complaint six days before the limitations period expired – but the district

court delayed ordering service of process for four months, while it considered whether the suit was sufficiently meritorious. 845 F.2d at 1053 n.2. The appeals court found the delay inordinate, since "[i]f the marshal's office had simply followed the path laid out by Rule 4(d) within six days of Mondy's filing, Mondy would have been entitled to relation back under Rule 15(c)." *Mondy*, 845 F.2d at 1057. It expressly distinguished circumstances such as those here, noting that "the equities may not weigh in favor of a plaintiff who counts on 'same day service' [but] Mondy's behavior did not set up any such photo-finish." *Ibid.* (citation omitted); see also *Warren*, 867 F.2d at 1157-1158 (complaint filed six days before limitations period expired).

Similarly, in *Paulk*, the district court delayed service of process for more than a month after the complaint and application to proceed *in forma pauperis* were filed. 830 F.2d at 80 & n.1. The concern of the appeals court there was that a "delay [by the district court] in deciding to grant this motion could easily consume the thirty-day limitations period and make impractible the filing of *in forma pauperis* petitions in such suits." *Paulk*, 830 F.2d at 82. Additionally, the court noted that "to prevent relation back under Rule 15(c) whenever the district court has not [acted] * * * within the limitations period" could create equal protection problems. *Id.* at 83. Thus, it ruled that the limitations period must be tolled in a case very different from the present one, holding that where a plaintiff has filed his complaint and application to proceed *in forma pauperis* within the limitations period, that period must be tolled "to allow service of summons and the complaint at the later direction of the district court." *Ibid.*

The Seventh Circuit has not yet determined whether it would apply its holding in *Paulk* to facts like those here,

where a district court acted promptly on an *in forma pauperis* application, and a plaintiff had an additional 21 days in which to file suit. Nor is it clear that the Tenth Circuit would decline to toll the thirty-day limitations period of Section 2000e-16(c), on facts like those in *Paulk*. Until one or the other court so determines, review by this Court is unnecessary.

2. Petitioner's contention that he was not required to name the Postmaster General as defendant is unavailing. The courts of appeals have uniformly held that employment discrimination suits brought pursuant to Title VII and arising out of employment with the Postal Service must name the Postmaster General as defendant.[7] See, *e.g.*, *Schoo* v. *United States Postal Service*, 865 F.2d 1259 (4th Cir. 1988) (affirming unpublished decision), cert. denied, No. 88-1254 (June 19, 1989); *Jarrell* v. *United States Postal Service*, 753 F.2d 1088, 1091 (D.C. Cir. 1985); *McGuinness* v. *United States Postal Service*, 744 F.2d 1318, 1322 (7th Cir. 1984); *Cooper* v. *United States Postal Service*, 740 F.2d 714, 715-716 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985).

Petitioner's contention that this Court's decision in *Loeffler* v. *Frank*, 108 S. Ct. 1965 (1988), compels a different result is without merit. *Loeffler* held only that in light of the broad waiver of sovereign immunity effected by the Postal Service's authority to "sue and be sued," the Postal Service is liable for prejudgment interest to the

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[7] Section 505(a) of the Rehabilitation Act, 29 U.S.C. 794a(a), provides that civil actions brought by federal employees alleging discrimination on the basis of handicap are governed by the remedies, procedures, and rights set forth in Title VII. Thus, Title VII's requirement that a civil action name the agency head as defendant is expressly applicable to suits alleging discrimination on the basis of handicap. See Pet. App. 4-6 & nn. 2-3.

same extent as is a private party named as a defendant in a Title VII suit. At the same time, the Court made clear that plaintiffs still must comply with express requirements governing the commencement of a Title VII action against a federal employer. *Loeffler,* 108 S. Ct. at 1974. Section 2000e-16(c) plainly and unequivocally states that in an employment discrimination civil action brought against a federal employer, "the head of the department, agency, or unit, as appropriate, shall be the defendant." Nothing in *Loeffler's* construction of the Postal Service's "sue and be sued" authority suggests that this condition on commencing suit is not applicable to the Postal Service.[8] The court of appeals' conclusion (in accordance with the uniform course of decisions cited in our preceding paragraph) that petitioner could only bring suit against the head of the Postal Service—the Postmaster General—is thus correct.

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[8] The Court ruled only that the distinction between the head of an agency and the agency cannot blunt the force of the "sue-and-be-sued" clause's waiver of sovereign immunity. *Loeffler,* 108 S. Ct. at 1973 n.8. It did not suggest that an explicit statutory requirement that the head of the agency be named in certain suits (see 42 U.S.C. 2000e-16(c)) is without effect.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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